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THE Illinois State Bar Association, at its recent meeting, considered at great length the subject of reform in the jury system, the verdict in the Cronin case, no doubt having directed attention anew to the peculiar uncertainty of that system. The views of the leading members of the association were conflicting, some favoring a majority, others a three-fourths verdict. It is notorious that jury verdicts in general, are as apt to defeat as to enforce the legitimate demands of the law. It was the idea of its founders, that the requirement of a unanimous conclusion, on the part of twelve men, is the best possible assurance of satisfactory results; but experience is constantly refuting this theory. In most instances the unanimous verdict is only a compromise, and compromises of justice are at once both illogical and indefinite, and in very many cases the apparent agreement of the twelve does not represent the sincere and honest conviction of a single one of the number. Frequently, as in the Cronin case, the verdict is practically rendered by one man, whose obstinacy forces the eleven to accept his opinion.

It is only in the two great English speaking countries that a unanimous conclusion is required of juries. In all the rest of the civilized world a majority vote is sufficient, and it does not appear that justice suffers thereby. But we still cling to the doctrine, which makes legal travesties of many criminal trials, reason being plainly on the side of a different method of weighing evidence and imposing penalties. We are not even consistent in the matter, for we apply the other rule to courts composed of several judges. Thus the seeming absurdity is presented of a verdict, found by the unanimous vote of twelve jurymen, which may be reversed by the majority vote of the judges, who consider it on appeal. Why should not juries have a like privilege of passing upon the merits of the case in a rational and substantial way? The fact that the present method is not yielding sound results is becoming more and more apparent, and the demand for a change will have to be met sooner or later.

IT appears that "trusts" have met with another set back, and at the hands of a California court. A decision has been rendered by Judge Wallace of the Superior Court of California in a suit brought by the attorney general against the American sugar refining company, in which he holds that the company forfeited its corporate franchise by surrendering the control of its business to the sugar trust. In this decision, it will be found that the judge took ground similar to that taken by the New York Supreme Court, in the case against the North River sugar refining company.

THE Supreme Court of Minnesota might, with profit, study the opinion in Harris v. People, recently decided by the Supreme Court of Illinois. That case reiterates the well established rule of the common law, that a prisoner accused of a felony must be arraigned in person, must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced. And it was further held that the record must affirmatively show that the defendant was present during the trial, a failure in this regard not being aided by those presumptions which the law ordinarily raises in support of the judgments of courts of general jurisdiction. The Supreme Court of Minnesota, not long ago, in the case of State v. Brown, overruled an objection upon the part of the defendant that the record failed to show affirmatively that he was present throughout the trial. It seems that the record showed his presence at the time of entering plea of not guilty and of giving his testimony, but with these exceptions there was nothing to show the presence of the accused in court from the time of the impannelling of the jury until the sentence was pronounced. From all that appears the defendant might have been in Canada or any other place than the court room when the verdict was rendered and at other periods of the trial, and though the language of the court is not entirely clear, Vanderburgh, J., seems to lay down the rule that if the defendant was absent it should be made affirmatively

to appear. To sustain this remarkable opinion no authorities are cited and the question is but meagerly discussed. If anything were needed to show the error of this position, it might be found in the very exhaustive opinion of the Illinois court before referred to. The distinction between the two courts on the question at issue is the more marked and noticeable from the fact that in the Minnesota case a man's life was at stake—in the Illinois case only his liberty.

NOTES OF RECENT DECISIONS.

THE remedies open to an employee engaged for a fixed period, but wrongfully discharged before its expiration, were stated by the Court of Appeals of Maryland in Keedy v. Long, 18 Atl. Rep. 704. There it was held that where an employee, being engaged for a year at a fixed salary, payable monthly, is discharged at the end of two months, and sues and recovers for the salary due up to that time, he cannot thereafter sue his employer for a breach of the contract. The court says:

The contract between these parties was clearly for a definite period—a scholastic year—and not one merely at will. The terms used in the letter quoted are sufficient to establish this, apart from any reference to the nature of the employment, and the character of the services agreed to be performed. Before the expiration of that period the appellee was discharged, and, let us assume in considering the subject, wrongfully, discharged. What, then, were her remedies? It was formerly determined in England, and followed in some cases in this country, that in such a case the servant holding himself in readiness to perform his contract, and being able and willing to do so, was entitled to recover his wages for the whole term, upon the ground of constructive service. This doctrine had its origin in a decision by Lord Ellenborough, at *nisi prius*, in Gandell v. Potigny, 4 Camp. 375, 1 Starkie, 198. It was followed in other cases, then doubted, again adopted, but finally repudiated altogether, in Elderton v. Emmens, 6 C. B. 160; Goodman v. Pocock, 15 Q B. 576. "A servant wrongfully discharged," says Smith, in his work on Master and Servant (59 Law Lib. 94), "has, however, the two following remedies open to him at law, either of which he may pursue immediately on his discharge: First, he may treat the contract of hiring and service as continuing, and bring a special action against his master for breaking it by discharging him—and this remedy he may pursue whether his wages are paid up to the period of his discharge or not; or, secondly, if his wages are not paid up to the time of his discharge, he may treat the contract of hiring and service as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered." These two alternative remedies are the only ones open to him. Mayne, Dam. 159. Upon a *quantum meruit*, he can only recover for the services actually rendered. Archard v. Hornor, 3 Car. & P. 349; Smith v. Hayward, 7 Adol. & E. 544. In an action for damages for a breach of the contract he will be entitled to recover the actual damages he has sustained, in addition to the wages earned; and, in case he has, by diligence, been unable to secure other employment during the entire term, he can recover the entire wages, less the amount he has actually earned during the interim, or the amount he might have earned by the exercise of proper diligence in seeking for employment in the same or similar business. Wood, Mast. & Serv. 249; Mayne, Dam. 158; Elderton v. Emmens, *supra;* Goodman v. Pocock, *supra*. The servant will not be allowed to bring more than one of these alternative actions. Wood, Mast. & Serv. § 125. If he elects to sue upon a *quantum meruit*, he must treat the contract as rescinded (Bull v. Shuberth, 2 Md. 57); and he will not be allowed to maintain afterwards an action for damages, which action is founded on the assumption of the continuance of the very same rescinded contract. And so, conversely, when he treats the contract as a continuing one, by suing for a breach of it occasioned by his having been wrongfully discharged, he cannot be permitted to recover also upon a *quantum meruit*, where a recovery presupposes the total rescission of the agreement. Hence, when he pursues one of the two only remedies open to him, he of necessity abandons the other; and a recovery in one would be a complete bar to any subsequent action on the other. This is so in actions of this characters, because the two remedies are alternative. Herein lies the distinction between this class of cases and the decision relied on and cited by the appellee. These latter, of which Davis v. Brown, 94 U. S. 423, is an example, announce a correct doctrine, which however, has no application, for the reason just indicated, to cases like the one now before us. The servant has a choice between two distinct remedies. When he elects to pursue one of them, he is by that selection excluded from resorting to the other. Accordingly, in Goodman v. Pocock, *supra*, which was an action of *assumpsit* for work and labor, where it appeared at the trial that the defendant engaged the plaintiff, as a commercial traveler, from January 23, 1847, at a salary of £200 a year, payable quarterly, and dismissed him from that employment on April 8, 1848; that the plaintiff then brought an action for the wrongful dismissal, and the jury gave damages for a portion of unpaid salary up to January 23, 1848, and for disbursements and expenses, and also £50 for the wrongful dismissal, and stated that they had not taken into the account any services rendered between the 23d of January and the date of plaintiff's dismissal—it was held that a ratable portion of salary for the broken quarter commencing January, 1848, could not be recovered, even though Lord Denman, C. J., in the first action had erroneously refused to permit the jury to allow for the services actually rendered during the broken quarter. Coleridge, J., said: "In a case like this the servant may either treat the contract as rescinded, and bring *indebitatus assumpsit*, or he may sue on the contract; but he cannot do both." Earle, J., Observed: "I am of the same opinion. The plaintiff had the option either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. He choose the latter course; and he cannot now turn round, and try the former course.'

THE rule as to the imputation of contributory negligence to one who is injured, in an

attempt to save the life of another, is thus stated by the Supreme Court of Louisiana in Peyton v. Texas & Pac. Ry. Co., 6 South. Rep. 690:

Similar positions and circumstances have several times been presented to judicial investigation, as involving the question of negligence, and have been variously construed. But the opinion which commends itself to our approbation, as resting on sound principles of humanity, is to the effect that they do not constitute contributory negligence on the part of the person who is injured in the attempt. Text-writers on railroad law and kindred subjects have formulated the rule thus: "When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another, who is exposed to a sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons." The principle was culled from a well considered opinion of the Court of Appeals of New York, in the case of Eckert v. Railroad Co., reported in 43 N. Y. 503. Beach, Contrib. Neg. 45; 2 Thomp. Neg. 1174; Pierce, R. R. 328; Rorer on R. R. 1029. The ruling has received subsequent judicial sanction, and, appreciating it as rational, and as tending to foster a proper spirit of generous impulses towards persons who are in danger, we add our indorsement to that of other courts of last resort, in other States of the American Union. The evidence is satisfactory on the point that the attempt of plaintiff to save the life of a human being, or at least to rescue him from imminent peril, cannot be characterized as rash or reckless, in the judgment of prudent men, and that this venture would have been successful and harmless, if the train had not approached the station with reprehensible speed.

A QUESTION of constitutional law of considerable interest arose in State v. Goodwill, 10 S. E. Rep., decided by the Court of Appeals of West Virginia. There it was held not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power. The third section of chapter 63, Acts 1887 (Code 1887, p. 983) which prohibits persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as is specified in the said act, is unconstitutional and void. The court says:

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them; as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor; make contracts in respect thereto, upon such terms as may be agreed upon by the parties; to enforce all lawful contracts; to sue, and give evidence; and to inherit, purchase, lease, sell, and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States, and other courts. Yick Wo v. Hopkins, 118 U. S. 356, 6 S. C. Rep. 1064; Slaughter-house Cases, 16 Wall. 36; Butcher's Union Co. v. Crescent City, etc., Co., 111 U. S. 746, 4 S. C. Rep. 652; 6 Meyer Fed. Dec. § 1000; *In re* Jacobs, 98 N. Y. 98; People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29; *Ex parte* Westerfield, 55 Cal. 550: Ragio v. State, 2 Pickle, 272, 6 S. W. Rep. 401; State v. Divine, 98 N. C. 778, 4 S. E. Rep. 477.

The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provision of the constitution. People v. Otis, 90 N. Y. 48. The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the constitution. If the legislature, witout any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts. "Questions of power," says Marshall, C. J., in Brown v. Maryland, 12 Wheat. 419, "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

No one questions the position that, unless the government intervened to protect property, and regulate trade, property would cease to exist, and trade would exist only as an engine of fraud; but this does not authorize the government to do for its people what they can do for themselves. The natural law of supply and demand is the best law of trade. In Munn v. Illinois, 94 U. S. 113, and other cases involving the same questions, the Supreme Court of the United States has held that persons or corporations engaged in occupations in which the public have an interest or use may be regulated by statute. But the reasons assigned for these decisions are that the public has a use in these occupations, and that the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed by others not so engaged; that their business implies a trust and public duty; and

that the government has, therefore, the power to see that this trust is not abused, and that the duty imposed by it is properly performed. On this principle, statutes have been upheld which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph, and other companies; hackmen, warehousemen, and owners of water-mills, etc. But we are aware of no well considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employee, even in this class of occupations; much less in cases that are not impressed with a public trust or duty. But the claim is made that the legislature should pass the act now in question in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, safety, and welfare of society. Its exercise in extreme cases is frequently justified by the maxim *salus populi suprema lex est.* It is used to regulate the use of property by enforcing the rule, *sic utere tuo, ut alienum non lædas.* Under it, the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation. The limit of the power cannot be accurately defined; and the courts have not been willing definitely to circumscribe it. But this power, however broad and extensive, is not above the constitution, which is the supreme law; and, so far as it imposes restraints, the police power must be exercised in subordination to it. *In re* Jacobs, 98 N. Y. 98; Cooley, Const. Lim. 719; Mugler v. Kansas, 123 U. S. 623, 8 S. C. Rep. 273. Generally it is for the legislature to determine what laws and regulations are proper, in the exercise of the police power; but if it passes an act ostensibly for the public health or safety, and thereby destroys or takes aways the property of a citizen, or interferes with his rights or personal liberty, then it is for the courts to determine whether it is a proper and reasonable exercise of the power, and, if it is not, to declare it void. Austin v. Murray, 16 Pick. 121; State v. Gilman, *ante*, 283 (decided at the present term).

The right to regulate the rate of interest existed at the time the constitution was adopted, and cannot, therefore, be considered as either an abridgment or restraint upon the right of the citizen guarantied by the constitution. The power to pass usury laws exists by immemorial usage; but such is not the case with such acts as we are now considering. Munn v. Illinois, 94 U. S. 113, 153.

Our act is almost a literal copy of an act passed by the legislature of Pennsylvania on June 29, 1881. Laws Pa. 1881, p. 147. In Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. Rep. 354, the supreme court of that State declared the first four sections of that act unconstitutional and void. The court, in its opinion, says: "The first, second, third, and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." In Millet v. People, 117 Ill. 294, 7 N. E. Rep. 631, the Supreme Court of Illinois, in a well considered opinion, held unconstitutional and void an act of the legislature of that State which required the owners or operators of mines to provide scales for weighing their coal, and make the weight of coal the basis of the wages of miners. A part of the syllabus is as follows: "It is not competent for the legislature, under the constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power."

In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant, and the laborer is an imbecile. "Such legislation," as is well said by the court in *Re* Jacobs, 98 N. Y. 114, "may invade one class of rights to-day and another to-morrow; and, if it can be sanctioned under the constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

THE liability of a municipal corporation for the negligent acts of its officers came before the Supreme Court of Illinois in Culver v. City of Streator, 22 N. E. Rep. 810, where it was held that a municipal ordinance forbidding dogs to run at large being a police regulation, the municipality is not responsible for the negligent acts of one employed by it to enforce such ordinance. The court says:

The matter of regulating and restraining the running at large of dogs by a municipal corporation manifestly pertains to the police power. That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances, and regulations as pertain to the comfort, safety, health, convenience, good order, and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers. The pleader, in drafting the declaration, seems to have endeavored to obviate the conclusions to be drawn from the character of the duties which the officer in question was performing at the time the plaintiff was injured, by designating and describing him as a "servant" or

"employee" of the city, and alleging that he was hired and employed by the city to perform said duties. Merely denominating him a "servant" or "employee" does not make him such in a sense calling for an application of the maxim *respondeat superior*. Whether he was a servant or employee in that sense depends mainly upon whether he was employed to perform acts which the corporation could do in its private or corporate character, or acts which the corporation was empowered to do in its public capacity as a governing agency, and in discharge of duties imposed for the public or general welfare. Acts performed in the exercise of the police power plainly belong to the latter class. Police officers appointed by the city are not its agents or servants so as to render it impossible for their unlawful or negligent acts in the discharge of their duties. Accordingly it has been held that a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city (Buttrick v. City of Lowell, 1 Allen, 172); nor for illegal and oppressive acts of officers committed in the administration of an ordinance (Board v. Schrœder, 58 Ill. 353); nor for an arrest made by them which is illegal for want of a warrant (Pollock's Admr. v. City of Louisville, 13 Bush, 221; Cook v. City of Macon, 54 Ga. 468; Harris v. City of Atlanta, 62 Ga. 290); nor for their unlawful acts of violence, whereby in the exercise of their duty in suppressing an unlawful assemblage an injury is done to the property of an individual (Stewart v. New Orleans, 9 La. Ann. 461; Dargan v. Mayor, 31 Ala. 469). Upon the same principle it has been held that a city having power to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, is not liable for the negligence of the firemen appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire, run over the plaintiff on their way to the fire (Hafford v. New Bedford, 16 Gray, 297; Wilcox v. City of Chicago, 107 Ill. 334); nor for injury to the plaintiff caused by the bursting of a hose of one of the engines of the city, through the negligence of a member of the fire department (Fisher v. City of Boston, 104 Mass. 87); nor for negligence whereby the sparks from a fire engine of the city caused the plaintiff's property to be burned (Hayes v. City of Oshkosh, 33 Wis. 314.) In like manner it is held that where a city under authority of law, establishes a hospital, it is not liable to persons injured by the misconduct of its agents and employees therein. City of Richmond v. Longs Admrs., 17 Grat. 375. See, also, 2 Dill. Mun. Corp. §§ 973-975, and authorities cited in notes.

The ground upon which the foregoing cases, and many others of like nature, are admitted as exceptions to the general rule of corporate liability, is that in those matters the city acts only as the agent of the State, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which it derives some special or immediate advantage or emolument in its corporate or private character. The police regulations of a city are not made or enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations. Calwell v. Boone, 51 Iowa, 687, 2 N. W. Rep. 614; Prather v. Lexington, 13 B. Mon. 559; Elliott v. Philadelphia, 75 Pa. St. 347; Board v. Schrœder, *supra*.

RES ADJUDICATA IN CHURCH COURTS.

It is laid down as a general rule that the decisions of church courts upon matters over which they have proper jurisdiction will be accepted by the civil tribunals as conclusive and binding upon them. There is a great difference of opinion as to what this "jurisdiction" embraces. In Shannon v. Frost,[1] the society of an independent Baptist church, by a majority vote, expelled certain members without trial or hearing. The church property had been conveyed in trust "for the use and benefit of the Baptist Society in the town of F., known by the name of the F. Baptist church in the county of F." The expelled members organized themselves into a society, elected trustees, and claimed to be entitled to use the church property as they answered the terms of the trust and had been deprived of their rights by an unjust expulsion. The court held that as they had no ecclesiastical jurisdiction they could not revise the finding of the church tribunal, to which these people were in voluntary subjection, and decide whether the expulsion and excommunication was just or unjust. The expulsion settled the question of membership, and as these people were no longer members they had lost their rights to the property, which depended upon membership. It is not stated in the report of this case, whether the society had the right to expel without trial or hearing. If it had not, certainly an accused member would be entitled to notice of the charge against him and an opportunity to be heard, in reply; and, although a civil court might be bound by the decision of the society, even if it was unjust, after trial, it would seem that rights of property should not be violated by any such arbitrary and illegal proceeding as seems to have been followed in this case. Some of the later cases certainly hold that such a society as this cannot claim respect for its decision when it has violated its own forms of procedure.

Where an individual religious society or a larger ecclesiastical body exists under a written constitution, some courts have held that they had the right to see whether the jurisdiction of the church tribunal had been constitutionally exercised; others, that the church itself was the sole and proper judge of its

[1] 3 B. Mon. (Ky.) 253.

own action in this respect. In Smith v. Nelson,[2] the following bequest had been left to a church: "$150, as a donation to 'The Associate Congregation at Ryegate;' to be placed under the direction of the trustees of said society, and the interests thereof to be paid to their minister forever." The question was whether a certain Mr. P., who claimed to be the minister of this congregation, was entitled to this legacy. This congregation was part of a large organization whose governing bodies were a series of ascending courts,—the church court or session, the presbytery and synod—and the jurisdiction, original and appellate, of each court was defined by a constitution which also prescribed the discipline to which the members were subject and the form of procedure in case of trial. Mr. P. had been deposed from the ministry in entire violation of his constitutional rights, as he contended, and a majority of his congregation adhered to him. The synod, the highest court, had taken the action which was alleged to be unconstitutional. The civil court examined the whole proceeding, and decided that it was unconstitutional and arbitrary, and that Mr. P. could not be deprived of his rights of property by such method. The same question, however, came before the courts of New York in Robertson v. Bullion,[3] where, in consequence of the deposition from the ministry of the defendant, the congregation became divided and each claimed the property. The court in this case held that as to the *status* of the defendant, they were bound by the action of the synod, and would not decide whether such action was legal or not.

In Watson v. Avery,[4] the Supreme Court of Kentucky claimed the right to examine the jurisdiction claimed by the tribunals of the Presbyterian Church. This denomination is governed by a series of ascending courts, which have executive, legislative and judicial powers. The first is the church session; then the presbytery, the synod, and general assembly. Each has certain original, and, above the session, appellate, jurisdiction, which is defined by the constitution of the whole church. The session consists of elders who are elected by the qualified members of the congregation. Trouble had arisen in the congregation on account of dissatisfaction with the session, and a member of the church who had been cited for trial before the session applied to the synod to appoint a commission to settle their church difficulties by calling a meeting of the church to elect additional elders, in order that he and others might be tried by a court which would not be entirely prejudiced against them. This commission was appointed, a congregational meeting called, which was obliged to convene in a place outside of the church, because the session and their party refused to allow the use of the building. At this meeting elders were elected, and afterwards ordained. This branch of the congregation also elected trustees, and then applied to the civil court to secure them the use of the church building in conjunction with the rest of the congregation, who refused to recognize them. The whole question turned upon the legality of the election of these additional elders. If they were legally elected, they had the right to be recognized by the whole congregation as members of the session: If not, they had no such right. The general assembly, the immediate superior of the synod, had approved the action of the latter in appointing this commission and holding a congregational meeting under its authority, and had declared that the elders so elected were to be recognized as elders of that church. The court, however, after an examination of the powers of the several church tribunals, under the constitution, decided that the synod had no power to interfere in the affairs of a congregation in the manner it did by the appointment of this commission. That, in so doing, it had not exercised any appellate jurisdiction, as it had not proceeded upon any appeal from an inferior court. Nor did it exercise original jurisdiction, for no such jurisdiction had been conferred upon it by the constitution. And further, that the sanction of the general assembly did not make the matter any better, for that body, although it was the highest authority in this church, did not possess such unlimited powers as to convert, by its declaration, an unconstitutional into a lawful act. One judge of the court dissented upon the ground that the civil court was bound by the decision of the general assembly in declaring that its action was constitutional.

[2] 18 Vt. 511.
[3] 9 Barb. 64.
[4] 2 Bush (Ky.), 335.

The constitutionality of the action of a church court came before the Supreme Court of Pennsylvania in 1875, in another branch of the Presbyterian Church, in the case of McAuley's Appeal.[5] The synod, the highest court in this branch of the church, had suspended an elder of a particular church session, who had not been condemned by his session or presbytery; and had revoked the suspension of two other elders of the same session, whose case was not before synod by appeal; and did several other unconsitutional acts. A certain presbytery, within whose bounds was the church whose elders had been thus dealt with, passed a resolution denouncing the "unconstitutional, disorderly, arbitrary and injurious action of synod" and suspending their relations to synod "until such action be revoked, or it obtained further light," and in the meantime claimed to remain in the said Reformed Presbyterian Church. The synod thereupon passed this resolution: "The presbytery having by its own act declined the authority of synod and withdrawn from its jurisdiction, the officers and members thereof are declared to be without the jurisdiction of synod * * * and such officers and members of the various congregations who have not identified themselves with the act of secession of the presbytery but avow their obedience to synod, are the (original) congregations," etc. The pastor and elder of the "fifth" congregation had voted in presbytery for the above resolution, and the congregation became divided, part adhering to the pastor, and part to the synod. The property of this congregation had been conveyed "to and for the only proper use and behoof of the said congregation, their successors and assigns, forever," and by the articles of incorporation, the congregation was to consist of those who adhered to and maintained the system of religious principles declared and exhibited by the "Reformed Presbyterian Synod of North America." Each party claimed to be the "fifth" church. The court held that if the allegations in the Presbyterian resolution as to the unconstitutional action of synod were correct, the presbytery was justified in pursuing the course it did. But aside from that, that the exscinding resolution of synod was entirely unconstitutional and in violation of all its forms of procedure, and that no rights of property could be prejudicial by any such action of a church court. The same point came before the court again in Kerr's Appeal[6] in 1879 and was decided in the same way.

The point was made in both cases that the church court of last resort was the tribunal to decide the question of jurisdiction. As a slight indication of the difference of opinion on this subject among those who might be supposed to be well informed in both the civil and ecclesiastical law, McCauley's Appeal was argued before seven judges, five decided the exscinding act of synod unconstitutional, two dissented. Of the majority, two (one of whom delivered the opinion); and of the minority, one, were Presbyterian elders; while in Kerr's Appeal the court consisted of the same number, but its personnel had been changed by the substitution of two new members in place of two former judges whose term had expired, and four of the seven judges were now presbyterian elders. The court stood, as before, five to two. Two of the majority, and the two dissenters, were Presbyterian elders.

The case of the State of Missouri v. Farris,[7] was a *quo warranto* proceeding to test the legality of the election of a trustee. The charter of a certain college provided that vacancies in the board of trustees should be filled by the presbytery, which was, "in connection with the general assembly of the Presbyterian Church in the United States of America, styled 'old' school." Some years before this case arose, the general assembly had passed certain resolutions, enjoining loyalty to the government, approving the emancipation proclamation and denouncing slavery. Instructions were also given to the proper authorities that any applicants for missionary or ministerial work, or church membership, should be examined as to their sentiments in regard to loyalty and the subject of slavery; and if they had been actively engaged in the rebellion or held the views of the Southern Presbyterian Church that "the system of negro slavery in the south is a divine institution, and that it is the peculiar mission of the southern church to conserve that institution," they should be required to repent and forsake these sins before they

[5] 77 Pa. St. 397.

[6] 89 Pa. St. 97.

[7] 45 Mo. 183.

could be received. Certain Presbyterians, in consequence of this action of the assembly, adopted and published what was called "a declaration and testimony against the erroneous and heretical doctrines and practices which have obtained and been propogated in the Presbyterian Church of the United States during the last five years." They further denounced the action of the assembly and declared an intention to refuse to be governed by such action, and invited co-operation in a concerted resistance to "the usurpation of authority" by the assembly. The assembly in turn denounced "the declaration and testimony" and declared that every presbytery that refused to obey its orders should be *ipso facto* dissolved, and called to answer before the next (annual) general assembly. And in case a presbytery did not so answer, it was to be dissolved and the ministers and elders who adhered to the general assembly were to constitute the presbytery. A certain presbytery met and was found to contain among its members one or more of the signors of the "declaration and testimony," and was, upon motion, declared to be dissolved. The consequence was that the presbytery was divided: The party which adhered to the general assembly was recognized by that body to be the legal presbytery; and the "declaration and testimony" party formed another presbytery, claimed recognition from the assembly, which was refused, and elected trustees of the college. It was held that this so-called presbytery had no right to elect trustees. That the rightfulness of the action of the assembly in passing those resolutions, and deciding that the "declaration and testimony" party did not constitute a legal presbytery, could not be questioned in the civil court. The court say "whether the declaration and testimony signors were regularly or irregularly before the assembly was for it alone to determine. The utter impolicy of the civil courts attempting to interfere in determining matters which have been passed upon in church tribunals, arising out of ecclesiastical concerns, is apparent." There is an intimation, however, that the action of the civil court might have been different if the title of property had been concerned.

Precisely this same question, where the title of property was concerned, came before in the Supreme Court of the United States in Watson v. Jones.[8] Here, in consequence of this action of the assembly and of a presbytery, a division was caused in the presbytery in the synod (a body superior to the presbytery and inferior to the assembly), and in a congregation subject to the presbytery, one side in each adhering to the assembly, and the other to the "declartion and testimony" party. The church property was claimed by each division of the congregation and the point was, which had maintained its proper ecclesiastical connection. The court held that the "declaration and testimony" party were not justified in their rebellion, and announced the principle upon which their decision rested as follows: "We think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and State under our system of laws, and supported by a preponderating weight of judicial authority is, that whenever the questions of discipline, or of faith, or ecclisiastical rule, custom or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." The court further say, "all who unite themselves to such a body do so with an implied consent of this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrived by one of their decisions could appeal to the secular courts and have them reversed. * * * It may be conceded that if the assembly should undertake to try one of its members for murder and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should entertain jurisdiction between two of its members as to their individual right of property, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded. * * * But it is a very different thing when a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the

[8] 13 Wall. 679.

conformity of the members of the church to the standard of moral required of them, becomes the subject of its action. It is easy to see that if the civil courts are to inquire into all these matters, the whole subject of doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination, may and must be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court." This case seems to go so far, only, as to hold that dissatisfaction with a standard of morality which the church may have had, and, in its own opinion, certainly did have, the right to set up, will not justify the rebellion of a portion of the membership of a religious society. There is at least room for doubt as to what the decision would have been if the standard of morals had been arbitrary and tyrannical, or one which the church had clearly no right to make, and a member had been deprived of his interest in property by excommunication for non-conformity thereto; or if the views of the court had been favorable to slavery and kindred subjects.

In Gibson v. Armstrong,[9] the question of the effect upon property rights of the amicable division of a religious body came before the court. The Methodist Episcopal Church, on account of certain irreconcilable views on certain moral and political questions, agreed to divide, each division to retain all the characteristics of the original body and to differ only as to the territory over which it had jurisdiction. The churches along the line of separation were to have the right of deciding by a majority to which division they would adhere. It was held by the court that this church had the constitutional power to divide, and that the minority of a congregation was bound by the vote of the majority in making choice. The court intimate that if there had been any doubt as to the constitutional power of the church to act in this way, the civil tribunal would be bound to accept the decision of the highest authority of the church, that it did have such power.

In all the foregoing cases, some right to property was involved except in the Missouri case, in which the court appeared to consider the right to an office not such a right. In Chase v. Cheney,[10] an application for an injunction to restrain a spiritual tribunal from proceeding with the trial of a minister, upon the ground that its form of procedure was unconstitutional, was refused, as the court considered that the loss of salary was not such an injury to property as could give the civil court jurisdiction. Two of the court dissented upon that point, and it has been intimated, but not decided, in O'Hara v. Stack,[11] that a minister has such right of property in the emoluments which his church affords him as to justify an appeal to the civil tribunal if he is unjustly deprived of them.

None of these cases, however, turn upon the point that there was any violation of the terms of a trust. No decision by a majority of an individual society or of the highest authority of a religious body would be allowed to violate the terms and conditions of a defined trust for religious purposes.[12]

The mere severance of an ecclesiastical connection will not violate a trust unless the maintenance of such connection was a condition upon the property that was held.[13] Nor will a trust be affected by the blotting out of minor points of religious belief in consequence of the union of two branches of a church if it is within the constitutional powers of the highest authority in each branch of such union.[14]

Civil tribunals may, and sometimes must, ascertain by their independent examination what was the faith or belief to maintain which a trust was instituted, and how far those who are enjoying the property have departed from such belief, in order to determine the question of the diversion of trust property.[15]

[9] 7 B. Mon. (Ky.) 481.

[10] 58 Ill. 509.

[11] 90 Pa. St. 477.

[12] Attorney-General v. Pearson, 3 Mer. 353; Field v. Field, 9 Wend. 394; Means v. Pres. Ch., 3 W. & S. (Pa.) 303; Trustees v. Sturgeon, 9 Pa. St. 321; Brendle v. Congregation, 33 Pa. St. 415; Brown v. Church, 23 Pa. St. 495; Winebrenner v. Colder, 43 Pa. St. 244; Sutter v. Congregation, 42 Pa. St. 503; Schnorr's Appeal, 67 Pa. St. 138; Roshi's Appeal, 69 Pa. St. 462; Jones v. Wadsworth, 4 W. N. C. (Pa.) 514; Bouldrin v. Alexander, 15 Wall. 131; Church v. Wilson, 14 Bush (Ky.), 255; Hadley v. Mendenhall, 89 Ind. 136; Hatchett v. The Church, 45 Ark. 291.

[13] Congregation v. Johnson, 1 W. & S. (Pa.) 9; Calkins v. Cheney, 92 Ill. 463; App v. Congregation, 6 Pa. St. 201.

[14] McGinnis v. Watson, 41 Pa. St. 9.

[15] Attorney-General v. Peason, 3 Mer. 353; Miller v. Gable, 2 Denio, 492.

The conclusiveness of the findings of church tribunals has really been touched at only two points by the decided cases. One embraces those instances where a fact has been established by the religious society acting in either its legislative or judicial capacity. Some of the authorities seem to hold that this finding is conclusive, no matter how it may have been arrived at. Others, including the later ones, that the value of the decision depends upon whether the society has followed its own established forms and rules of procedure, and they decline to recognize the right of a society to act in disregard of its constitutional obligations. The other point which has claimed attention, is the right of the society to exact conformity to rules of opinion and conduct which it has established. In the two or three cases which have presented this point, the courts have held that, even in cases where the right of the society to make such rules may be doubtful, its decisions upon the subject will be accepted, so far at least as to refuse to justify any rebellion on the part of any members of such society who may be dissatisfied with, or entirely reject, the action of the body to which they belong. WM. H. BURNETT.

Philadelphia, Pa.

INTOXICATING LIQUORS - SALES—DELIVERY.

FLEMING V. COMMONWEALTH.

Supreme Court of Pennsylvania, November 4, 1889.

Where A orders liquors from B, directing him to ship them by a common carrier "C. O. D.," the sale is completed when A delivers the goods to the common carrier, and B is not liable to criminal prosecution on the ground that he had no license to sell liquors at the place of A's residence, B having such license at the place of shipment.

GREEN, J.: In the case of Garbracht v. Com., 96 Pa. St. 449, which was an indictment for selling liquor without license, we hold that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him." In that case the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier to be forwarded to its destination in Mercer county. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal held any license for the sale of liquor in Mercer county. This decision was not changed in the least upon a subsequent trial of the same defendant on a different state of facts, as reported in 1 Penn. 471. In the case now under consideration the liquor was sold upon orders sent by mail by the purchasers, living in Mercer county, to the defendant, who is a wholesale liquor dealer in Allegheny county. The goods were set apart at the defendant's place of business in Allegheny county, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer county, and by the carrier transported to Mercer county, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the case of Garbracht, *supra*, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of Garbracht.

It is claimed, and it was so held by the court below, that, because the goods were marked "C. O. D.," the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of the delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liabilities to the seller for the price of the goods if he pay the price to the carrier. The liability for the price is transferred from the seller to the carrier; and whether the carries receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the

carrier, and he choses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods. Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to receive the goods. This was the case in Henderson v. Lauck, 21 Pa. St. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser absolutely to pay the price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them over as against the seller is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and the purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, where the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is Higgins v. Murray, 73 N. Y. 252. There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D was not inconsistent with, and did not affect, his right to enforce the defendant's liability. In the course of the opinion, Chief Justice Church said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability

would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. * * * Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of, and for the benefit of, the defendant (assuming that it was done in accordance with the directions), it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. * * * As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In Hutchinson on Carriers, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods. And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty—that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal *status* of the parties results that the seller has a remedy for the price of the goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale, and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them.

Thus far we have regarded the transactions between the parties in its aspect as a civil contract only; but, when viewed in its aspect as the source of a criminal prosecution, the transaction becomes much more clear of doubt. It is manifest that, when the purchaser ordered the goods to be sent to him C. O. D., he constituted the carrier his agent, both to receive the goods from the seller, and to transmit the price to the seller. When, therefore, the goods were delivered to the carrier at Pittsburgh for the purpose of transportation, the duty of the seller was performed, as we have already seen, so far as he and the purchaser were concerned, and as between them the transaction was complete. The duty of transportation devolved upon the carrier, and for it he was, in one sense, the agent of the seller, as well as of the purchaser; but, as it was to be at the expense of the purchaser, the delivery to the carrier was a delivery to the purchaser; and this was ruled in Garbracht's case. The injunction to the carrier to collect the money on delivery imposed an additional duty on the carrier, which the carrier was, of course, bound to discharge. This arrangement was a matter of convenience, both to the purchaser and the seller, relative to the payment and transmission of the price; but that is all. To convert this entirely innocent and purely civil conversation, respecting the mode of collecting the price of the goods, into a crime, is, in our judgment, a grave perversion of the criminal law, to which we cannot assent. As a matter of course, there is an utter absence of any criminal intent in the case. The defendant had a license. The sale was made at his place of business, and both the sale and delivery were completed within the territory covered by the license. If, now, a criminal character is to be given to the transaction, it must be done by means of a technical inference that the title did not pass until the money was paid; and thus that the place of sale, which in point of fact was in Allegheny county, was changed to Mercer county, where no sale was made. Even granting that, in order to conserve the vendor's lien, such a technical inference would be justified for the purposes of a civil contract, it by no means follows that the plain facts of the

case must be clothed with a criminal consequence on that account. So far as the criminal law is concerned, it is only an actual sale without license that is prohibited. But there was no such sale, because all the essential facts which constitute the sale transpired in Allegheny county, where the defendant's license was operative. The carrier, being the agent of the purchaser to receive the goods, does receive them from the seller in Allegheny county, and the delivery to him for the purpose of transportation was a delivery to the purchaser. This is the legal, and certainly the common, understanding of the sale. The statute, being criminal, must be strictly construed; and only these acts which are plainly within its meaning, according to the common understanding of men, can be regarded as prohibited criminal acts. We cannot consider, therefore, that a mere undertaking on the part of the carrier to collect the price of the goods at the time of his delivery to the purchaser, though the payment of the price be a condition of the delivery, can suffice to convert the seller's delivery to the carrier for transportation and collection into a crime. We therefore hold that the sales made by the defendant upon orders, C. O. D., received from the purchasers were not in violation of the criminal statute against sales without license, and the conviction and sentence in the court below must be set aside. The judgment of the court of quarter sessions is reversed, and the defendant is discharged from his recognizance upon this indictment.

NOTE.—Where there is an executory agreement for the sale of goods, such goods remain the property of the vendor till the contract is executed.[1] Such passing of title and execution of contract are synchronous. It is true, as a general rule, that when the seller receives an order for goods, and ships them by the common carrier designated by the purchaser, or ships them by a common carrier according to the usual course of business, the title passes as soon as the goods are placed in the possession of the carrier.[2] An agent took orders in A for liquors, subject to the approval of his principal in B. The principal delivered the goods to the express company in B, to be delivered to the purchaser in A. The sale was held to have been made in B.[3] In such contracts the intention of the parties governs as to when the title passes.[4] When the shipper reserves the *jus disponendi*, which has generally been evidenced by taking the bill of lading in his own name, or by inclosing a bill of exchange to the buyer for acceptance, the title does not pass.[5] Where goods were ordered, to be paid for by a draft due in forty-five days, and the draft was sent to the consignee with the bill of lading, it was held that the acceptance and return of the draft were necessary before the title passed.[6]

A contract provided for the delivery of the goods free on board the ship and for payment to be made in cash on delivery of the goods. The bill of lading was made to the consignor and indorsed by him to his agent. It was held that the delivery of the goods was not a condition precedent to the passing of title.[7] A asked B to buy liquor for him when he went to the town of M. The liquor was sent and delivered to A at his residence in C, when he paid for it and took a receipt. The sale was considered to have been made in C.[8] Where iron was shipped to various places to be paid for as it was delivered, the contract was held to show that the intention was not to pass the title till the iron arrived at its destination.[9] Where a note was to be given and the freight charges were to be paid by the consignees on the delivery of the goods to them at B, the title to the goods was transferred at B.[10]

A custom has grown up of late years for carriers to transport goods "C. O. D." The courts now judicially recognize the meaning of these words, and hold that, so far as the carriers are concerned, they have added a new provision to their contracts. They have agreed, in addition to their other duties, not to deliver the goods till the consignee pays for them, and if they dispense with such payment they are liable to the shipper for the money.[11] In such cases it is said that the carrier acts as the agent of the consignor to collect;[12] and elsewhere that the carrier is agent for the consignor, both in transporting and in delivering the property to the consignee.[13]

There are three cases, wherein upon a sale of goods upon order and a delivery to the carrier "C. O. D.," it was held that the title did not pass, and the contract was not executed till the goods were delivered to and paid for by the consignee. Two of these cases refer to sales of liquors;[14] the other refers to articles of merchandise.[15] The case mentioned in the opinion of the court in the principal case [16] is not fully in point. There the plaintiff agreed to manufacture goods, and he was entitled upon their completion to his pay. He subsequently shipped the goods at defendant's request, and consequently the defendant took the risk of loss. The court expressly stated that the case "does not depend upon where the technical title is, as in the sale of goods." A contract to manufacture articles is governed by different rules from those applicable to contracts for sales of goods. The decision in the principal case seems to imply that, because there is a right of action for an executory contract for the sale of goods by the vendee, there must have been a transfer of title to the goods and a completion of the contract. The criminal law seems only to reach a sale completed, while the civil law provides for damages in cases where the sale is not completed and there is no transfer of title.

If the intent should govern in this case, the facts, as stated in the dissenting opinion, would well justify the decision, that the title remained in the vendor till the money was paid, and that the sale was completed in Mercer.

1 Benj. on Sales (Corbin's Am. notes), § 348.
2 Merchant v. Chapman, 4 Allen, 362; Benj. on Sales (Corbin's Am. notes), §§ 181, 517, 490, 516, 1040; Charles v. Lasher, 20 Ill. App. 86.
3 Frank v. Hoey, 128 Mass. 263.
4 1 Benj. on Sales (Corbin's Am. notes), § 309, n.
5 *Idem*, §§ 433-464.
6 Mathewson v, Belmont F. Mills, 76 Ga. 357.
7 1 Benj. on Sales (Corbin's Am. notes), § 419, n.
8 Com. v. Shurn, 145 Mass. 150.
9 Thompson v. Cin., etc. R. Co., 1 Bond, 152.
10 Congar v. Galena, etc. R. Co., 17 Wis. 477.
11 Am. Ex. Co. v. Schier, 55 Ill. 140; Am. Ex. Co. v. Lesem, 39 Ill. 312; U. S. Ex. Co. v. Keefer, 59 Ind. 263; Gibson v. American, etc. Co., 1 Hun, 387; American, etc. Co. v. Wolf, 79 Ill. 430; Collender v. Dinsmore, 55 N. Y. 200.
12 Hutchings v. Ladd, 16 Mich. 493.
13 Herrick v. Gallagher, 60 Barb. 566.
14 State v. O'Neil, 58 Vt. 140; U. S. v. Shriver, U. S. D. C. (Ill.), 23 Fed. Rep. 134.
15 Baker v. Bourcicault, 1 Daly, 23.
16 Higgins v. Murray, 73 N. 5. 252.

Such matters should not be left to judicial determination when a statute could so easily set the matter at rest. In Connecticut, the place of delivery is the place of sale by statute, though the contract is made elsewhere,[17] and one who sells by sample by soliciting or procuring orders, is liable under the law, though the orders are filled by his employer in another State and the goods are shipped from there.[18]

S. S. MERRILL.

[17] State v. Basserman, 54 Conn. 88.
[18] State v. Ascher, 54 Conn. 299.

RECENT PUBLICATIONS.

NATIONAL BANK CASES, containing all decisions of the United States Supreme Court and decisions of the State courts relating to National Banks, from 1881 to 1889, with notes and references. By Irving Browne, Editor of "The Albany Law Journal," and "The American Reports." Vols. 1, 2 and 3. San Francisco: Bancroft-Whitney Co., Law Publishers & Law Booksellers. 1889.

Volume III of this series of reports has just made its appearance. It includes all the decisions of the courts, federal and State, relating to national banks from 1881 to 1889. Volume I which appeared in 1878 contained the decisions on the same subject from 1864 to 1878, and volume II from the latter date to 1880. The value of these reports to bank attorneys or indeed any one having business in that direction cannot be overstated. The volumes are prepared by and under the direction of the learned editor of the Albany Law Journal, Mr. Irving Browne. The last volume contains all the late cases, and among them will be found many of great interest and value, noticably United States v. Britton, containing the law under an indictment of a national bank officer for making false entries, etc. Moores v. Citizens Nat. Bank, on the subject of rights of a purchaser of a fraudulent certificate of stock in national bank, Boyer v. Boyer, Stanley v. Board of Supervisors, and Wasson v. First Nat. Bank, as to State taxation of national bank shares.

CONSTITUTIONAL HISTORY OF THE UNITED STATES, as seen in the development of American Law. A course of lectures before the Political Science Association of the University of Michigan. By Judge T. M. Cooley, of Ann Arbor; Hon. Henry Hitchcock, of St. Louis; Hon. Geo. W. Biddle, of Philadelphia; Prof. Charles A. Kent, of Detroit; Hon. Daniel H. Chamberlain, of New York. New York and London: G. P. Putnam's Sons. The Knickerbocker Press. 1889.

We took occasion in a recent editorial (29 Cent. L. J. 421), to notice the very able address of Hon. Henry Hitchcock which appears in this series. And we regret very much that want of space prevents our giving an extended review of all of them. Together they form a complete connected history of the development of the Supreme Court of the United States, as disclosed by its decisions. The first lecture on the Federal Supreme Court, was appropriately assigned to Judge Cooley than whom there exists to-day no abler expounder of the powers and limitations of that court. The influence of John Jay, the first Chief Justice of the United States is interestingly portrayed. Webster once said with truth that "when the spotless ermine of the judicial robe fell on John Jay it touched nothing not as spotless as itself."

The next lecture is that of Mr. Hitchcock who writes of Chief Justice Marshall. The third lecture was by Geo. W. Biddle, of Philadelphia, on "Constitutional Development as Influenced by Chief Justice Taney." As that great man presided in the supreme court for more than a quantity of a century, and during the period of the civil war when the court was called on to decide questions of vital importance growing out of the complications of the times, the potency of his influence on constitutional development will be readily appreciated. The fourth lecture on "Constitutional Development as Influenced by Decisions of the Supreme Court since 1864," was delivered by Charles A. Kent of the Michigan bar. The period covers the careers of Chief Justices Chase and Waite. It is a period of great historical interest and importance, the court having been called upon to pass on the thirteenth, fourteenth and fifteenth amendments, on the legislation of the period of reconstruction and the great question involved in the legal tender cases. The fifth lecture is by Daniel H. Chamberlain of New York, at one time Governor of South Carolina, on "The State Judiciary—Its place in the American Constitutional System." This lecture will be found to contain an interesting discussion of the relations which exist between the States and the United States, and the opinion is advanced that after the Declaration of Independence and prior to the adoption of the Federal Constitution, the States were sovereign and independent, but since the adoption of the constitution, the States and the United States have each been sovereign within the limits marked out by that instrument. These lectures are prefaced with an interesting article by Mr. Henry Wade Rogers, who in capital style and after the manner of a model toast master, introduces the eminent lecturers and their subjects.

BOOKS RECEIVED.

A TREATISE on the Wrongs called Libel and Slander, and on the Remedy by Civil Action for these Wrongs, together with a chapter on Malicious Prosecution. By John Townshend. Fourth Edition. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau St. 1890.

VOID EXECUTION, JUDICIAL AND PROBATE SALES, and the Legal and Equitable Rights of Purchasers thereat, and the Constitutionality of Special Legislation Validating Void Sales and authorizing Involuntary Sales in the absence of Judicial Proceedings. By A. C. Freeman, author of Treatises on "Judgments," "Executions," "Cotenancy and Partition," etc. St. Louis, Mo.: Central Law Journal Company, Law Publishers and Publishers of the Central Law Journal. 1890.

QUERIES.

QUERY NO. 7.

Some years ago A owned a lot in the city of F, and the railroad company run their road upon and over it, without condemning or purchasing the right of way. Then A sells the lot to B, and B takes the lot with full knowledge of the railway being upon the lot, and that A had an unadjusted claim against the railway. Can B maintain an action against the railway company, compelling them to pay him (B) damages? Can B assert it and recover anything from the railway company? M.

HUMORS OF THE LAW.

"He never had but one genuine case in his life," said a lawyer of his rival, "and that was when he prosecuted his studies."

JUDGE (to prospective grand juryman)—"What is your occupation?"

P. G. J.—"Collector for the gas company."

JUDGE. "You are excused. It would be impossible for you to bring in a true bill."

'WHAT prompted you to rob this man's till?" asked the judge of the prisoner.

"My family physician, sir," was the reply. "He told me it was absolutely necessary that I should have a little change."

NO OPINION FORMED.—Judge — You are a freeholder?

Prospective Juryman—Yes, sir.

Judge—Married or single.

Prospective Juryman—Married three years ago last month.

Judge—Have you formed or expressed any opinion?

Prospective Juryman.—Not for three years past.

HOW THE HANGING HAPPENED.—Western Judge —"You are charged, sir with being the leader of a party that hunted down and lynched a horse-thief. The days have gone by when citizens of this great commonwealth can taken the law into their own hands, hence your arrest. What have you to say?" Prominent Citizen—"I ain't guilty, jedge. I'll tell you how it was. We caught the fellow and tied his hands and feet. Nothing wrong about that, was there, jedge?" "No; that was no doubt necessary." "Wall, jedge, there was a storm comin' up and we couldn't spare him an umbrella very well, and so we stood him up under a tree. That was all right, wasn't it?" "Certainly." "Wall, the clouds kept gatherin' an' the wind was purty high, and we didn't want him blown away, so we tied a rope around his neck and fastened the other end to the limb above—not tight, jedge, just so as to hold him—and we left him standin' solid on his feet. Nothin' wrong about tha , was there?" "Nothing at all." "Then I can be excused, can't I?" "But the man was found suspended from that tree and stone dead the next morning." "None of us had anything to do with that, jedge. You see we left him standin' there in good health and spirits, for we gave him all he could drink when we said 'good-bye,' but you see durin' the night the rain came up an' I 'spose the rope got purty wet an' shrunk a couple o' feet. That's how the sad accident happened, jedge."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ABDUCTION—Adoption — Constitutional Law.— Under How St. Mich. § 9099, on a trial of the parents and grandfather of a child for taking her away from her foster parents, it is error to charge, *inter alia*, that defendants had no right to seek to estrange the child from her foster-parents, and that if they induced her to go away by allurements or promises as to the kind of clothes or home she would have, intending to destroy her love for her foster parents, or if they did anything of that kind, then they would be guilty.—*People v. Congdon*, Mich., 43 N. W. Rep. 986.

2. ADVERSE POSSESSION—Deeds. — Where one who is in possession of a strip of land, together with adjoining land deeds such adjoining land, and transfers to his grantee possession of the undeeded strip as well as the other, the possession of the grantor may be tacked to that of the grantee, so as to give the latter, at the end of twenty years from the time such possession was first taken, a title by adverse possession. — *Faloon v. Simshauser*, Ill., 22 N. E. Rep. 835.

3. APPEAL—Dismissal.— Under Rev. St. Tex. art. 2201, requiring an appellant to file a bond payable to the judge, and "conditioned to prosecute his appeal," etc., but not requiring it to be given in any sum, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed.—*Howard v. Russell*, Tex., 12 S. W. Rep. 525.

4. APPEAL — Record. — Under Rev. St. Ill. ch. 110, § 73, which provides that an authenticated copy of the record of a judgment, order, or decree appealed from shall be filed in the supreme court on or before the second day of the next term, an appeal will be dismissed upon a failure to file a copy of the record, certified by the clerk of the lower court, within that time. —*Glos v. Randolph*, Ill., 22 N. E. Rep. 797.

5. APPLICATION OF PAYMENT. — A debtor making a voluntary payment may direct to which account or debt, if there be more than one, the credit may be applied. If he makes no such application, then the creditor may apply it.—*King v. Sutton*, Kan., 22 Pac. Rep. 695.

6. ARREST IN CIVIL CASES. — Facts held sufficient to justify an arrest under Rev. St. Wis. § 2689, providing that defendant may be arrested in an action for the recovery of damages on a cause of action not arising out of contract, and in actions to recover damages for the value of property obtained by the defendant under false pretenses or false tokens. — *Warner v. Bates*, Wis , 43 N. W. Rep. 957.

7. CARRIERS—Passenger.—In an action against a railroad company, for personal injuries received by plaintiff while riding on defendant's train without a ticket, where the evidence as to whether plaintiff was a passenger or a trespasser is conflicting, it is reversible error to instruct the jury that if they believe from the evidence that the plaintiff, without negligence on his part was injured by defendant's negligence, as alleged in the declaration, they should find the defendant guilty; thus taking from the jury the question whether plaintiff was a passenger. — *Chicago, etc. R. Co. v. Mehlsack*, Ill., 22 N. E. Rep. 812.

8. CARRIERS OF PASSENGERS — Connecting Lines. — A railroad company which sells a coupon ticket over its own and connecting lines, containing the condition, referred to in each coupon, that the company, in issuing the ticket, acted for itself over its own line, and as agent of the connecting lines, but assumed no responsibility beyond its own line, and would not permit stopover privileges, is not liable for injuri eceived by the

holder while riding on the connecting line.— *Kerigan v. Southern Pac. R. Co.*, Cal., 22 Pac. Rep. 677.

9. CARRIERS—Connecting Liens.—The facts insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract. —*Gulf, etc. Ry. Co. v. Baird*, Tex., 12 S. W. Rep. 530.

10. CHATTEL MORTGAGES—Mortgagee.—Where a mortgagee takes the mortgaged goods into his possession after default, but tenders them back to the mortgagor upon the payment of the debt by the latter, the mortgagor cannot insist upon their being returned to him. He must take them at the place where the mortgagee has stored them for safe-keeping. — *Gale Manuf'g Co. v. Phillips*, Mich., 43 N. W. Rep. 1035.

11. COMPROMISE—Fraud.— Where, in an action on an insurance policy, a compromise and money accepted by the plaintiff in full settlement are set up as a defense, a charge that, if the settlement was made *mala fide* and obtained by the misrepresentations of the defendant, and the plaintiff was led into it by deceit or fraud, then plaintiff could recover on the policy, is error, since the plaintiff is not entitled to so ignore the settlement after having received benefit under it. — *Home Ins. Co. v. McRichards*, Ind., 22 N. E. Rep. 875.

12. CONSTITUTIONAL LAW—Drainage.— Laws Wis. 1889, ch. 383, creating a drainage commission for Dane county, and requiring the commissioners to decide whether the public health or welfare requires drains, to classify lands for assessment therefor, to assess such benefits and taxes, to sue and be sued, and to enforce assessments, is not obnoxious to Const. art. 4, § 31, prohibiting the legislature from enacting any special or private law granting corporate powers or privileges except to cities, since the act, though conferring corporate powers, is an exercise of police power for the public health and welfare.— *State v. Stewart*, Wis., 43 N. W. Rep. 947.

13. CONTRACT—Damages.— Where a contract provides that the party violating it shall pay to the other a certain sum as liquidated damages, no liability will attach to the party in default, if his default resulted in mere nominal damage to the other party.—*Hathaway v. Lynn*, Wis., 43 N. W. Rep. 956.

14. CONTRACT—Parol.—A parol agreement to devise a farm in consideration of support for life, though void under the statute of frauds, is sufficient foundation for a claim against the promisor's estate after his death for the value of the support rendered. — *Schoonover v. Vochon*, Ind., 22 N. E. Rep. 777.

15. CONVERSION—Judgment.—Testator, by his will declared that, after the satisfaction of certain devises and bequests, "I desire the remainder of my estate to be equally devided between my children," naming them. "I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate:" *Held*, that the will did not operate by its own force to convert the land into money, so as to place it beyond the lien of a judgment recovered against one of the children before the sale by the executor, which lien, by Rev. St. Mo. 1879, §§ 2354, 2730, 2731, 2767, attaches to any interest of the debtor in land, whether legal or equitable.—*Eneberg v. Carter*, Mo., 12 S. W. Rep. 522.

16. CORPORATIONS—Directors.— Under Civil Code Cal. § 2230, where certain officers of a corporation have, in their capacity of directors and trustees of the stockholders, passed resolutions allowing and ordering to be paid an indebtedness to themselves, such resolutions are voidable by the corporation, or, upon its refusal, by a minority of the stockholders, whether the transaction was fair and honest or not. — *Graves v. Mono Lake Min. Co.*, Cal., 22 Pac. Rep. 665.

17. CORPORATIONS—Directors. — Under St. Cal. 1880, p. 134 providing that on failure to make and post on the first Monday of each month, an itemized account of all disbursements and receipts during the preceding month, the directors of a mining corporation shall be liable to any stockholder complaining thereof in the sum of $1,000 liquidated damages, negligence on the part of the directors appears on showing their failure to make and post the account on the first Monday in the month, though it is admitted that they did not have the necessary information to make it, and the burden is on the directors to show exculpatory circumstances.— *Schenck v. Bandmann*, Cal., 22 Pac. Rep. 654.

18. CORPORATION.— Under Civil Code Cal. § 309, where a mining corporation conveys its lands to another corporation in consideration of a part of the capital stock of the latter, such stock becomes the capital of the former corporation, which neither the directors nor stockholders can distribute among themselves until the corporation is dissolved in the manner prescribed by law, or until the term of its existence expires.— *Kohl v. Lilienthal*, Cal., 22 Pac. Rep. 689.

19. CORPORATIONS — Misappropriation. — Upon the facts held a misappropriation of corporate funds by its members and that any member not a party thereto could maintain a suit to compel a restoration. — *Ashton v. Dashaway Asso'n.*, Cal., 22 Pac. Rep. 660.

20. CRIMINAL LAW—Verdict— Indictment — Joinder of Offenses. — The petitioner was indicted upon four counts. The first charged him with stealing a horse. The second charged the same offense, but not under the same statute. The third and fourth charged him with receiving a stolen horse, knowing it to have been stolen. The jury returned a general verdict of guilty. Under How. St. Mich. § 9546: *Held*, that the judgment, if valid at all, could only be made so by confining it to the least offense charged, for which, under the general laws, the extreme penalty is five years, and petitioner having served out that term must be released. — *In re Franklin*, Mich., 43 N. W. Rep. 997.

21. CRIMINAL LAW—Remarks of Counsel.—A statement by the prosecuting attorney, in his address to the jury, that the complaining witness had whispered to him that counsel for the defense had wanted to arrange that the defendant plead guilty, will cause a reversal of the conviction, though the court then rebukes the prosecuting attorney.— *People v. Treat*, Mich., 43 N. W. Rep. 983.

22. CRIMINAL LAW — Embezzlement by Public Officer. —Act Ind. March 5, 1883, makes it the duty of a county officer to pay over to his successor all moneys remaining in his hands as such officer, and for failure so to do he is declared to be guilty of embezzlement: *Held*, that the statute is not to be construed in its broad sense, but an indictment, in addition to the words of the statute, must allege that the act charged was done feloniously. —*Stropes v. State*, Ind., 22 N. E. Rep. 773.

23. CRIMINAL LAW—Threatening Letter. — Under Pen. Code Cal. §§ 518, 519, an information is sufficient which charges that defendant sent a letter to a certain person which expressed and implied, and was adapted to imply, a threat to impute disgrace to him, and to expose it; which letter, as set out, stated that the writer, having found out all the facts charged against such person in a certain newspaper, would, for a certain amount, not only disclose nothing, but prevent discovery by his antagonists, "should they employ detective," but on condition that an answer must "come before night."— *People v. Tonielli*, Cal., 22 Pac. Rep. 678.

24. CRIMINAL PRACTICE—ASSAULT AND BATTERY.—Under Const. Ind. art. 1, § 19, providing that in all criminal cases, the jury shall have the right to determine the law and the facts, it is error for the court, in an information for assault and battery, where it appears that the conflict between the parties had begun in a store, and had been renewed outside, to instruct the jury that the conflict in the store and the one on the sidewalk outside constituted one transaction.—*Myers v. State*, Ind., 22 N. E. Rep. 781.

25. DECEIT—IN PARI DELICTO.—In an action for fraudulent representations whereby defendant obtained plaintiff's note for the purchase price of Bohemian oats at an exorbitant price in return for an agreement a

bond of a fictitious corporation to sell a larger quantity for plaintiff at the same price on commission, it is error to direct a verdict for defendant on the theory that the transaction was illegal, and the parties *in pari delicto*.—*Hess v. Culver*, Mich., 43 N. W. Rep. 994.

26. DEDICATION—ACCEPTANCE.—A person owning a tract of land in a town conveyed a portion of it, describing it as being bounded by certain streets, "if extended." Some four months afterwards he conveyed another portion of the land, including that which would have been occupied by the streets above mentioned: *Held*, that these facts are insufficient to support a finding that any of the land was dedicated to the public for use as a street, as the latter conveyance revoked the offer, if any there was, in the former, there having been no formal acceptance of such offer.—*City of Eureka v. Croghan*, Cal., 22 Pac. Rep. 693.

27. DEEDS—CONSTRUCTION.—Where a husband quitclaims to his wife the farm on which they live, with the reservation that no conveyance shall be made by her without his written consent or his joining, and that the title shall revert to him in case of her death, and from the face of the deed and the surrounding circumstances, and from a bill of sale to her of the farming utensils, and the fact that he continues until her death to carry on the farm as before, it is apparent that it was not the intent to pass to her the absolute fee, the reservation will not be considered repugnant, and therefore void, but its effect will be to leave the title to the survivor.—*Bassett v. Budlong*, Mich., 43 N. W. Rep. 984.

28. DEEDS—ESTATE.—A certain deed construed, and held to give the grantees a life estate in the land.—*Grieber v. Lindenmeier*, Minn., 43 N. W. Rep. 964.

29. DIVORCE—CROSS-COMPLAINT.—Under Code Civil Proc. Cal. § 442, the defendant in an action to procure the annulment of a marriage may have a cross-complaint for divorce, as such proceedings arise out of contract, within the meaning of this provision.—*Wadsworth v. Wadsworth*, Cal., 22 Pac. Rep. 648.

30. DRAINAGE—SUBDISTRICTS.—Under Drainage Act Ill. June 27, 1885, which provides (section 52) that the commissioners of a special drainage district shall have like powers as other drainage commissioners, and (section 43) that the commissioners of drainage districts may subdivide their districts, the commissioners of special drainage districts have a right to form subdistricts.—*People v. Suigert*, Ill., 22 N. E. Rep. 787.

31. ELECTIONS AND VOTERS—DOMICILE.—Where a man who has acquired a domicile in Kansas returns to his former home in Illinois, stating at the time that he intends to return to Kansas, the fact that he remains in Illinois for several years, without repeating his statement, and votes at several elections there during different years, is sufficient evidence that he has abandoned his intentions of returning, and reacquired a domicile in Illinois.—*Moffett v. Hill*, Ill., 22 N. E. Rep. 821.

32. EMINENT DOMAIN—OPINION EVIDENCE.—Farmers who reside in the vicinity of a particular farm, who are acquainted with the farm, but who cannot testify to its market value or its usable or productive value, ought not to be permitted to state how much, in their opinion, the farm is depreciated in value by the appropriation of the right of way for a railroad across it.—*Ottawa, O. C. & C. G. R. Co. v. Fisher*, Kan., 22 Pac. Rep. 713.

33. EMINENT DOMAIN—COMPENSATION.—In condemnation proceedings, evidence that land near that in controversy has been offered for sale at a certain price is inadmissible.—*Sherlock v. Chicago, B. & Q. R. Co.*, Ill., 22 N. E. Rep. 844.

34. EMINENT DOMAIN.—Under How. St. Mich., p. 1295, § 7, relating to the condemnation of land for the improvement of city streets, does not authorize a jury in condemnation proceedings to disregard all the evidence introduced, and, upon a mere view of the premises, fix and determine the award to be made.—*City of Grand Rapids v. Perkins*, Mich., 43 N. W. Rep. 1037.

35. EXECUTORS—LEASES.—In an action for damages resulting from a leaky roof in the building rented of the defendants, as executors and trustees of an estate, the declaration alleging, in one count, false representations as to the condition of the roof, and, in another, misleading representations as to the repairs, and a failure to make them properly, it is necessary to show the contents of the will, and what authority it gave the defendants in their official capacity.—*Weise v. Rich*, Mich., 43 N. W. Rep. 976.

36. EXECUTION—SALE.—In an action brought by one for the use of another, a justice of the peace rendered judgment in favor of the beneficial plaintiff, and issued execution in favor of the nominal plaintiff. This execution was returned unsatisfied four days after its date. A transcript was immediately filed in the circuit court, and execution issued, under which, without personal notice, land worth more than twenty times the amount of the judgment was sold to the judgment creditor: *Held*, that the sale would be set aside by a court of equity even after the period of redemption had expired.—*Hobson v. McCambridge*, Ill., 22 M. E. Rep. 823.

37. EXECUTION—SALE.—Where a judgment creditor buys the judgment debtor's land at execution sale, and afterwards conveys the same to the attorney who brought the suit, the latter obtains no better title than that of the judgment creditor.—*Culver v. Phelps*, Ill., 22 N. E. Rep. 809.

38. EXECUTION—SALE.—A sale of land under execution on a judgment against persons having no title, though in possession, cannot pass the title.—*Pekin Min. & Milling Co. v. Kennedy*, Cal., 22 Pac. Rep. 679.

39. FALSE REPRESENTATIONS—EVIDENCE.—At the trial of an action for damages caused by misrepresentation as to the location of a two-acre tract of land, it is competent for the plaintiff to show that, shortly after he traded a tract of farming land to the defendant for the two-acre tract, the defendant mortgaged the farming land for a large sum of money, as it tends to show motive by subsequent conduct.—*Minx v. Mitchell*, Kan., 22 Pac. Rep. 709.

40. FRAUDULENT CONVEYANCES.—In an action to set aside, as fraudulent, conveyances of land by an insolvent debtor to one who reconveys to the debtor's wife, it is not necessary to allege fraud, or knowledge of the fraud, or knowledge that the debtor was insolvent, on the part of those taking the voluntary conveyances without consideration.—*McAninch v. Dennis*, Ind., 22 N. E. Rep. 881.

41. GARNISHMENT.—An order by a justice of the peace, in garnishee proceedings, directing the garnishees to pay money into court, is not a final judgment from which an appeal may be taken, under Rev. Stat. Wis. § 3753, providing that "any party to a final judgment rendered by a justice of the peace may appeal therefrom."—*Williams v. Briel*, Wis., 43 N. W. Rep. 952.

42. GUARANTY—RES ADJUDICATA.—One who guaranties payment of a note, and agrees to pay "all costs and expenses paid or incurred in collecting the same, including attorney's fees," is not liable for expenses and attorney's fees incurred by the payee in suing the guarantor himself upon the guaranty.—*Abbott v. Brown*, Ill., 22 N. E. Rep. 813.

43. INSURANCE—WAIVER.—Where a fire insurance policy has a forfeiture clause for incumbrance on the property, but the agent of the insurance company, who has power to make and deliver policies, has notice of an existing incumbrance, and intent to further incumber, and agrees to note these facts on the application, and the assured rests under the belief that it is so noted, the company is estopped from setting up the fact to defeat a recovery upon the policy, though it is not actually indorsed thereon.—*Copeland v. Dwelling House Ins. Co.*, Mich., 43 N. W. Rep. 991.

44. INSURANCE—Conditions—Waiver.—A local agent of a fire insurance company has no power, after issuing

a policy, to waive a condition therein which requires the assured, in case of loss, to render sworn proofs thereof.—*Knudson v. Fire Ins. Co.*, Wis., 43 N. W. Rep. 954.

45. JUDGMENT—Amendment.—Where a judgment, revived after the debtor's death, directs execution against his executors, instead of against his estate in their hands, and executions issue accordingly, and sales thereunder are made, it is too late to amend the judgment and executions.—*McKay v. Paris Exch. Bank*, Tex., 12 S. W. Rep. 529.

46. JUDGMENT.—Where a judgment for foreclosure of a mortgage is entered before proof is made to the court that notice of *lis pendens* has been filed in the county where the land is situated, it is merely an irregularity, and, the error being committed by the court, the judgment cannot be vacated at a subsequent term for such error.—*McBride v. Wright*, Wis., 43 N. W. Rep. 955.

47. JUDGMENT—Appeal.—The rendition of a judgment is its announcement by the court, and not its entry in the judgment book, within Code Civil Proc. § 939, providing that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." — *Schurtz v. Romer*, Cal., 22 Pac. Rep. 657.

48. JUSTICES OF THE PEACE.—Rev. St. Ill. ch. 139, § 141, which provides that, in a town which has been organized out of territory embraced within a city, the city council may regulate the number of justices of the peace to be elected within such town, but that the number elected shall not exceed the number allowed by law to other towns of like population, is in conflict with Const. Ill. art. 6 § 29, which provides that "all laws relating to courts shall be general and of uniform operation."—*Tissier v. Rhein*, Ill., 22 N. E. Rep. 848.

49. LANDLORD AND TENANT—Justice of the Peace.—An action under Rev. St. Ind. 1881, § 5225, may be brought before any justice of the peace in the county, and not necessarily before the justice of the particular township where the lands are situated.— *Scott v. Willis*, Ind., 22 N. E. Rep. 786.

50. LANDLORD AND TENANT- Leases.— A provision in a lease that the lessor shall have a valid and first lien for rent upon the property of the lessee does not create a lien on personal property acquired by the lessee after the execution of the lease.—*Borden v. Croak*, Ill., 22 N. E. Rep. 793.

51. LANDLORD'S LIEN—Trover.—Rev. St. Ill. ch. 80, § 31, which gives the lessor a lien on crops grown upon the demised land, does not vest him with such title thereto as to enable him to bring trover for the crops against a purchaser from the tenant.— *Frink v. Pratt*, Ill., 22 N. E. Rep. 819.

52. LIEN—Livery Stable Keepers.— The lien given the person, by §§ 3212, 3213, Rev. St., who furnishes feed and bestows care on a horse or other animal therein named, is a right, in the nature of a common-law lien, to retain possession as a security for the charges, and may be waived by the person's voluntarily parting with the possession to the owner without the charges being paid.—*Seebaum v. Handy*, Ohio, 22 N. E. Rep. 869.

53. LIMITATION OF ACTIONS. — Laws Wis. 1881, ch. 286, does not bar proceedings under Rev. St. Wis. § 3274 *et seq.*, to charge the heir with the debt of her ancestor; the act meaning that after three years from the death of a person no debt or claim shall continue to be a lien or valid claim against the land of which he died seised, so as to authorize the county court to order it to be sold by the administrator. — *Fisk v. Jenewein*, Wis., 43 N. W. Rep. 950.

54. LIMITATION OF ACTIONS — Contracts. — Decedent entered into a written contract with defendant by which she agreed, without specifying the time for doing so, to convey certain land to him, and defendant agreed, "in consideration of the premises," to pay decedent $12,000, "within fifteen months after final judgment" in a certain case: *Held*, that payment by defendant did not depend upon decedent's performance of her contract, and cause of action against defendant arose, and the statute of limitations began to run, at the time specified for the payment of the money, though decedent had not executed the conveyance.— *Donovan v. Judson*, Cal., 22 Pac. Rep. 682.

55. LOGS AND LOGGING—Liens. — Pub. Acts Mich. 1887, No. 229, relating to attachment to enforce a laborer's lien on logs, requires notice of the claim of the lien to be given to the owner. The owner of logs sold them, reserving the title in himself until paid for. The notice of claim was served only on the assignee of this contract: *Held*, in replevin by the assignee, where it appeared that the owner had been paid before the replevin suit was commenced, that the service was sufficient. — *Grand Rapids Chair Co. v. Runnels*, Mich., 43 N. W. Rep. 1006.

56. LOGS AND LOGGING—Lien.— Under Gen. St. 1878, ch. 32, § 63, "manual labor" in cutting, banking, or driving logs or timber includes the use of all implements or instrumentalities actually used in and necessary to the performance of such labor by the lumberman.— *Martin v. Wakefield*, Minn., 43 N. W. Rep. 966.

57. LOGS AND LOGGING—Lien.— Where the mill-owner, knowing that the lumber to be saved from the logs has been sold, saws them according to the purchaser's directions, separately piles the lumber, and marks it with his initials, and accepts the seller's note for the price of sawing, he thereby waives his right to a lien on the lumber.— *Tyler v. Blodgett & Davis Lumber Co.*, Mich., 43 N. W. Rep. 1034.

58. MALICIOUS PROSECUTION— Probable Cause. — The presumption of probable cause, which ordinarily prevails when it appears on the face of a petition for malicious prosecution that plaintiff was convicted in the trial court, but judgment reversed on appeal, is rebutted by further allegations that the conviction was procured by fraud in depriving plaintiff of the testimony of his principal witness by joining him as co-indictee.—*Boogher v. Hough*, Mo., 12 S. W. Rep. 524.

59. MALICIOUS PROSECUTION—Malice. — It was proper to charge the jury that in determining defendant's malice they might consider any statements which they found were made by him in which he expressed ill feeling against the plaintiff.— *Thurston v. Wright*, Mich., 43 N. W. Rep. 860.

60. MANDAMUS — State Officers. — *Mandamus* will lie against the auditor general to issue his warrant on the State treasury to pay a claim of a justice of the peace, duly allowed by the circuit court, incurred under How. St. Mich. § 9393.—*Lachance v. Auditor General*, Mich., 43 N. W. Rep. 1005.

61. MARRIED WOMAN'S CONTRACT.—Under Rev. St. Ind. 1881, § 5119, which provides that a married woman's contract of suretyship shall be void, a mortgage by husband and wife on land held by them jointly, to secure the husband's note given in payment for the land, is void as to the wife. — *Stewart v. Babbs*, Ind., 22 N. E. Rep. 770.

62. MASTER AND SERVANT. — Where a brakeman is injured in the discharge of his duties, and a competent surgeon, called with the conductor's consent, attends him, the conductor has no authority to engage additional surgeons on behalf of the railroad company. — *Louisville, etc. Ry. Co. v. Smith*, Ind., 22 N. E. Rep. 775.

63. MASTER AND SERVANT — Assumption of Risk. — A servant assumes, not only the risks ordinarily incident to his occupation, but also such extraordinary risks as he may knowingly and voluntarily encounter.—*Smith v. Winona, etc. R. Co.*, Minn., 43 N. W. Rep. 968.

64. MORTGAGES — Foreclosure. — Where land is conveyed to a trustee, with power to enter thereon and sell it, upon default in the payment of the note that the deed was given to secure, and demand of the holder of the note, a warranty deed, executed by such trustee before the happening of the condition precedent to his

right to sell, being in violation of his trust, is absolutely void, as provided by How. St. Mich. § 5583. — *Pierce v. Grimley*, Mich. 43 N. W. Rep. 932.

65. MORTGAGES — Foreclosure. — Where a mortgage, given to secure the debt of one who does not own the land, provides that the holder of the note may extend the time of payment on the maker's executing coupons for interest to accrue during such extension, the holder of the note may extend it, and fix the rate of interest which such coupons shall bear after maturity, without further consent of the mortgagor.— *Benneson v. Savage*, Ill., 22 N. E. Rep. 838.

66. MUNICIPAL CORPORATIONS— Public Improvements. —Commissioners who have been appointed to estimate the cost of a proposed local improvement, and who have made such report, are not competent witnesses, upon the hearing of objections to the confirmation of the special assessment therefor, to prove that they did not meet together to make such estimate as required by law.— *Quick v. Village of Forest River*, Ill., 22 N. E. Rep. 816.

67. MUNICIPAL CORPORATIONS—Ordinances. — Where two competing lines of railway pass through different parts of a city, and there is no material difference between the character of such parts, an ordinance limiting the speed of trains in only one part is void, as being unreasonable. — *City of Lake View v. Tate*, Ill., 22 N. E. Rep. 791.

68. MUNICIPAL CORPORATION—Taxation.—Act. Ill. June 3, 1879, amending the school law, which provides that school directors and village or city authorities may levy a tax, not to exceed 2 per cent., for educational purposes, and declares that it does not repeal or change special acts in relation to schools, does not authorize the board of education of the city of Bloomington, a corporation created by special act, to compel the city authorities to levy any tax beyond the amount authorized by such special act. — *People v. City of Bloomington*, Ill., 22 N. E. Rep. 833.

69. MUNICIPAL CORPORATIONS—Ultra Vires.— Where a city obtains the right to construct a gutter over private land, down the bank of the river on which it is situated, and thereupon without authority leases the ground acquired to the plaintiff, to be used by him for a private landing, on the condition that he fill in on either side of the gutter, and he incurs expense in filling in the gutter as far as it is built, but the city changes its plan, and abandons it, so that the land cannot be used for a landing, the plaintiff, while not entitled to damages against the city for breach of contract, may recover for the work he has done which has inured to the city's benefit. — *Schipper v. City of Aurora*, Ind., 22 N. E. Rep. 878.

70. MUNICIPAL CORPORATIONS. — The charter of the city of Detroit of 1886, § 122, which gives the common council power "to prohibit and prevent incumbering or obstructing of streets, lanes, alleys, cross walks, sidewalks, and public grounds and spaces, with vehicles, animals," etc., authorizes the enactment of an ordinance forbidding farmers, hucksters, peddlers, etc., from standing with their vehicles and carts on the streets adjacent to the city market, within 500 feet from said market.—*People v. Keir*, Mich., 43 N. W. Rep. 1039.

71. NEGOTIABLE INSTRUMENT—Indorser.—In an action against the maker of a note for the amount paid thereon by the indorser, it is no defense that the indorser paid it without proper demand and notice; for, as these are for the benefit of the indorser, he may waive any defects therein.— *Stanley v. McElrath*, Cal., 22 Pac. Rep. 673.

72. NEGOTIABLE INSTRUMENT— Consideration. — The time of payment as fixed by a note, may be controlled by a separate written agreement, made and entered into by the parties at the time of the execution of the note. —*Jacobs v. Mitchell*, Ohio, 22 N. E. Rep. 768.

73. NEGOTIABLE INSTRUMENTS. — The transferee of a promissory note, with knowledge that the same was given for the purchase price of wheat, and that at the time of its execution the sellers gave bond to sell for the maker within the next year a certain number of bushels at $15 per bushel, the maker acknowledging therein that the wheat was bought on speculation and that the price was a speculative value, and agreeing to pay in notes thirty three and one-half per cent. commission on all such sales, is not a *bona fide* purchaser.— *Goodrich v. McDonald*, Mich., 43 N. W. Rep 1019.

74. NEGOTIABLE INSTRUMENTS — Burden of Proof.—In an action on a promissory note payable to an accommodation indorser, and given by him to plaintiff as security for a loan, where the issue is whether the note belonged to plaintiff personally, or to a corporation of which he was the secretary, and whose funds were alleged to have been loaned, and where the testimony tends to show that it belonged to the corporation, it is proper to charge that the burden is on plaintiff to prove his ownership. — *Barnes v. Peet*, Mich., 43 N. W. Rep. 1025.

75. NEGOTIABLE INSTRUMENTS. — The indorsee of a note void as against public policy cannot recover of the indorser, if he had knowledge of the character of the note at the time of the purchase.— *Ward v. Doan*, Mich., 43 N. W. Rep. 980.

76. PARTITION—Dower. — A purchaser of land at partition sale does not, before confirmation of the sale, acquire such title as will enable him to acquire a release of an unsigned right of dower.— *Hart v. Burch*, Ill., 22 N. E. Rep. 831.

77. PARTITION — Resale. — A supplemental decree in partition, ordering a resale of the land for the payment of costs, does not, when there is no controversy over the original decree of partition, involve a freehold, within the meaning of Rev. St. Ill. 1889, ch. 110, § 89, giving the right to appeal directly to the supreme court in suits involving a freehold.—*Malaer v. Hudgens*, Ill., 22 N E. Rep. 855.

78. PRINCIPAL AND AGENT—Liability of Agent.—A loan agent is not liable to his principal for the value of goods delivered to him in payment of a loan, and so received, without authority from the principal, who repudiates the debtor's claim of payment, and still holds him for the debt.—*Perkins v. Hershey*, Mich., 43 N. W. Rep. 1021.

79. QUIETING TITLE—Evidence. — Where plaintiff conveys land to defendant in trust for herself, which defendant is to reconvey at the end of five years, the fact that, at the expiration of that time, plaintiff is in possession of the land does not authorize a finding that the legal title is in her.—*Harrigan v. Mowry*, Cal., 22 Pac. Rep. 658.

80. RAILROAD COMPANIES—Taxation. — Under Rev. St. Ill. ch. 120, § 109, which provides that all "railroad track" shall be assessed by the State board of equalization, a track to a quarry, constructed for the sole purpose of providing material to keep the road-bed in proper repair, cannot be assessed by the local assessor, and a tax levied upon an assessment by him is void.—*Chicago, etc. R. Co. v. People*, Ill., 22 N. E. Rep. 864.

81. RAILROAD COMPANIES—Station—Accommodations. —Where neither the charter of a railroad company nor any other statute prescribes the rules for locating its stations, *mandamus* will not lie to compel it to establish a station and stop its trains at a town on its line at which it has not been in the practice of receiving and delivering passengers and freight, under Act. Ill. 1877, § 1, (2 Starr & C. St. 1924). — *People v. Chicago, etc. R. Co.*, Ill., 22 N. E. Rep. 857.

82. REPLEVIN. — An action of replevin in the general form is the proper remedy for the recovery of possession of cattle distrained damage-feasant, where defendant has not acted in good faith in making the distraint, but has himself given opportunity for the trespass by his failure to build his portion of a line fence according to agreement with plaintiff. — *Cox v. Chester*, Mich., 43 N. W. Rep. 1028.

83. RES ADJUDICATA.— A judgment in ejectment, sustaining defendants' equitable title to the land, is a bar to a subsequent suit in equity, by the same plaintiffs

against the same defendants, to remove defendants' claim as a cloud on plaintiffs' title.—*Emmel v. Hayes*, Mo., 12 S. W. Rep. 521.

84. RES ADJUDICATA — A suit to enforce a vendor's lien is not barred by a suit by a mortgagee to foreclose a mortgage on the land, in which the present plaintiff was made a party defendant, and in which a decree was rendered quieting title in the present defendants against all the parties to that suit except a mortgagee. —*Jones v. Vert*, Ind., 22 N. E. Rep. 882.

85. SCHOOLS—Expulsion.—How. St. Mich. § 5069, does not authorize the enactment of a rule that "pupils who shall in any way deface or injure" school property shall be suspended until the property is replaced, as the rule woud include careless and negligent acts, done without willfulness.— *Holman v. School Trustees*, Mich., 43 N. W. Rep. 996.

86. SCHOOL SUPERINTENDENT—Compensation.—School Law Ill. 1885, § 20, which provides that in counties having not more than 100 schools the county board may limit the time of the county superintendent, does not authorize the superintendant of a county having more than 100 schools, who was in office when said act was passed, to receive any other compensation than that previously fixed by the board of his county.— *Jimison v. Adams County*, Ill., 22 N. E. Rep. 829.

87. SCHOOL DISTRICTS — Contracts. — A contract between a teacher and the school-district board must be in writing; but it is not necessary that it be reduced to writing during a session of the district board. It is enough if the contract, though made in parol, be entered into at such session. It may be reduced to writing and signed after the board has adjourned.—*Faulk v. McCartney*, Kan., 22 Pac. Rep. 712.

88. SHIPPING — Recordation. — As the act of congress (Rev. St. U. S. § 4192) in reference to recording mortgages on enrolled and licensed vessels in the office of the collector of customs supersedes so much of the Michigan law as refers to the recording of chattel mortgages in the township or city clerk's office, fraud will not be presumed from the withholding from record in the office provided by the State law of a bill of sale of a vessel given to secure money loaned. — *Haug v. Third Nat. Bank*, Mich., 43 N. W. Rep. 939.

89. SLANDER—Privileged Communications.—The reckless repetition of a mere rumor concerning the character of a candidate for public office, without any attempt to investigate its truth or probability, is not privileged.—*Burke v. Mascarich*, Cal., 22 Pac. Rep. 673.

90. SPECIFIC PERFORMANCE.— An agreement to give a mining lease, entered into for a nominal consideration, and by which the proposed lessee assumes no duties, will not be specifically enforced as against prior lessees and their assignees, where the proposed lessee knew of the existence of the prior lease, and that no proceedings to forfeit it, or re-enter on the land, had ever been instituted by the lessors, and where the proposed lessee, without making objection, knew of the transfer of the rights of the first lessees, whose title stood clear on the record, to third persons who paid a valuable consideration therefor, without knowledge of the agreement.—*Grummett v. Gingrass*, Mich., 43 N. W. Rep. 999.

91. SPECIFIC PERFORMANCE — Homestead. — In an action brought by a railroad company to enforce specific performance of a right of way contract, signed by the husband alone, over 320 acres of land, and it appears that a part of the land embraced in the contract is the homestead of the owner, but the pleadings, findings, and evidence fail to show what particular part of the land is occupied as a homestead, it is error in the trial court to decree specific performance as to the whole of the tract.— *Conboy v. Kansas, etc. Ry. Co.*, Kan., 22 Pac. Rep. 719.

92. SPECIFIC PERFORMANCE — Parties. — Where an action is brought for the specific performance of a written contract to convey real estate, and, prior to the commencement of the action, the vendor has sold and conveyed the legal title to a subsequent purchaser, such purchaser is a necessary party to the action, and a decree for a specific performance against the vendor, without making such purchaser a party, is erroneous.— *Atchison, etc. R. Co v. Benton*, Kan., 22 Pac. Rep. 698.

93. TAXATION—Relevy. — Laws N. Y. 1885, ch. 453, providing for the relevying by the comptroller of an unpaid tax which shall be ascertained to be illegal or void by reason of any irregularity or defect in the omission of statutory requirements, etc., is a curative statute, and cannot be made to apply where no assessment at all has been made, nor where the assessment was absolutely null and void. — *People v. Wemple*, N. Y., 22 Pac. Rep. 761.

94. TELEGRAPH COMPANIES—Damages.—A general demurrer to the petition, in an action for damages against a telegraph company, is properly sustained, where the only damage alleged is the mental and physical suffering of plaintiff and his wife, resulting from defendant's failure to deliver a message relating to the health of plaintiff's mother-in-law. — *Rowell v. Western Union Tel. Co.*, Tex., 12 S. W. Rep. 534.

95. TRESPASS.—Under Pen. Code N. Y. § 640, providing a penalty for willfully severing from the freehold of another anything attached thereto, it is not necessary to show malice, but it is sufficient to show that the act was done intentionally and with design. — *Anderson v. How*, N. Y. 22 N. E. Rep. 695.

96. VENDOR AND VENDEE.— A person claiming to own land under a quitclaim deed executed to him is bound to take notice of all superior titles to the land which might have been discovered by proper inquiry. — *Goddard v. Donaha*, Kan., 22 Pac. Rep. 708.

97. WILL. — Land was devised "unto the heirs of my son B, that his wife S has by him, or may have by him hereafter;" and the will further provided that "my son B shall have his support and living out of the estate that I have hereby given fo his children, so long as he shall live:" *Held*, that B did not take a life-estate, but the land vested in his children, and the crop grown thereon could not be subjected to the payment of B's debts.—*Rose v. Eaton*, Mich., 43 N. W. Rep. 972.

98. WILLS—Deeds. — Where a testator by will devises all his property, real and personal, to his wife, in trust for herself and her children, with a provision that when the youngest living child arrives at his majority one-half of the estate shall be divided equally among the children then living, each child takes an absolute, alienable interest in the estate, which can be defeated only by his death before the distribution, or by a disposal of the estate by the trustee. — *Wainright v. Sawyer*, Mass., 22 N. E. Rep. 885.

99. TESTAMENTARY CAPACITY.— When the evidence on the issue of testamentary capacity is conflicting, it is prejudicial error to charge that upon the whole case the burden is upon the proponent to establish the testator's sanity; the true rule being that, after establishing sanity by the subscribing witnesses, the legal presumption that every man is sane casts the burden on the contestant to show the contrary. — *Pendlay v. Eaton*, Ill., 22 N. E. Rep. 853.

100. WILLS—Construction. — A testator devised to his wife one-half "of all my property of which I may die possessed," and to his children the remaining half: *Held*, that as to community property the devise to the wife was of one-half of his moiety. — *In re Gilmore's Estate*, Cal., 22 Pac. Rep. 655.

101. WITNESS — Transaction with Decedent. — Where the mother of a bastard child is neither a party nor a privy to an action against the administratrix of the putative father on his alleged contract for the support of the child, and the plaintiff, by acting *in loco parentis*, has precluded herself from claiming that she furnished the maintenace on account of the mother, the latter's interest in the action is, at most, "remote, contingent, and uncertain," and her testimony concerning the contract is not incompetent, under Code Civil Proc. N. Y. § 9.—*Connolly v. O'Connor*, N. Y., 22 N. E. Rep. 753.